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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ORLY SCHUCHMACHER, as EXECUTOR, etc., et al., Plaintiffs and Respondents, v. JAMES McDERMOTT et al., Defendants and Appellants.	B288130 (Los Angeles County Super. Ct. No. PC056764)

APPEALS from orders of the Superior Court of Los Angeles County, Stephen Pfahler, Judge. Affirmed.

Gordon & Rees, Craig J. Mariam, Gary J. Lorch and Jason W. Suh for Defendants and Appellants.

Law Offices of Roger L. Stanard and Roger L. Stanard for Plaintiffs and Respondents.

Defendants and appellants James McDermott, Lisa Pena, Helen Martin, and Wendi Gladstone (collectively, the Current Directors) and Carol Brockhouse (Brockhouse), appeal postjudgment orders denying their motions for attorney fees after they obtained summary judgment in an action brought by plaintiffs and respondents Gershon Schuchmacher (Schuchmacher),[1] Kathleen Latham (Latham), and Michael Ruffino, doing business as Mike Ruffino Construction (Ruffino) (collectively, Plaintiffs). The Current Directors and Brockhouse also appeal the trial court's order granting Plaintiffs' motion to strike their memoranda of costs.

We affirm the trial court's rulings in their entirety. We conclude the moving parties failed to establish a statutory or contractual basis for an award of attorney fees. We also conclude the trial court acted within its discretion in striking the costs memoranda.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Overview.*

This litigation arises from a fire in April 2011 that caused damage to Schuchmacher's condominium unit in the Rockpointe condominium development in Chatsworth, California. Latham was a tenant in the unit at the time of the fire, and she hired Ruffino, a contractor, to perform repairs to the unit. Brockhouse was the general manager for Rockpointe Homeowners Association, Inc. (the HOA). The four individuals who are the Current Directors did not serve on the HOA's board during the

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[1] Schuchmacher passed away during the pendency of this action, and his daughter Orly Schuchmacher, as executor of his estate, has substituted into the action. In our discussion, we simply refer to respondent Schuchmacher.

time Schuchmacher owned the unit. Schuchmacher lost his condominium unit through foreclosure by his lender in November 2011.

2. *Pleadings*.

The operative first amended complaint, brought by Schuchmacher, Latham, and Ruffino, named 21 defendants including the Current Directors and Brockhouse, as well as the HOA, the HOA's attorneys, various previous directors of the HOA (the Former Directors), and Powerstone Property Management, Inc. (Powerstone), the property manager of the Rockpointe development.[2] As relevant to this appeal, the complaint set forth the following causes of action:

The first cause of action, brought by Schuchmacher alone and directed only against the HOA, alleged breach of common interest governing documents and requested attorney fees pursuant to Civil Code section 5975, subdivision (c) (hereafter Civil Code section 5975(c).)

The second cause of action, for breach of fiduciary duty, likewise was brought solely by Schuchmacher and named as defendants Brockhouse and others, namely, Powerstone, the Former Directors, and the HOA's attorneys.

The third cause of action, alleging a civil conspiracy, was brought by Schuchmacher, Latham, and Ruffino, and named as defendants the Current Directors and others, namely, the Former Directors, the HOA, the HOA's attorneys, and Powerstone.

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[2] The HOA, the Former Directors, the Current Directors, and Brockhouse (sometimes collectively referred to as the HOA Defendants), were represented by the same counsel.

Thus, Brockhouse was named only in the second cause of action for breach of fiduciary duty, and the Current Directors were named only in the third cause of action alleging a civil conspiracy.

The complaint alleged in substance as follows: Shortly after the fire, the HOA submitted a claim to Farmers Insurance under its master policy. The HOA collected $76,025 in insurance proceeds on a damage estimate of $86,025 for the purpose of making repairs to the property. The HOA insisted that all work be completed before it would disburse the insurance proceeds, but it thereafter refused to reimburse Plaintiffs for the cost of the repairs. Instead, the HOA assessed Schuchmacher $10,000 for the insurance deductible without any proof that the damage was caused by the willful misconduct or a negligent act of Schuchmacher or his guests or tenant, in violation of the governing Covenants, Conditions and Restrictions (CC&Rs). As a result of the HOA directors' refusal to cause the HOA to timely pay for repairs to the real property, Schuchmacher was unable to pay his mortgage and lost his home of 20 years to foreclosure.

3. *Brockhouse and the Current Directors obtain summary judgment*.

On August 16, 2017, the trial court granted separate motions for summary judgment filed by Brockhouse and the Current Directors.[3]

With respect to Brockhouse, the trial court noted the opposition papers had conceded that she was not a proper party to the second cause of action for breach of fiduciary duty, and

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[3] At that time, the trial court also denied motions for summary judgment filed by the HOA and the Former Directors.

therefore she was entitled to judgment in her favor on the only cause of action that had been alleged against her.

The Current Directors similarly obtained summary judgment on the sole cause of action against them. The trial court ruled that because they were not directors during Schuchmacher's ownership of the unit, they were not his fiduciaries, and thus were legally incapable of conspiring to commit the tort of breach of fiduciary duty underlying the conspiracy claim.

On October 23, 2017, the trial court entered separate judgments in favor of Brockhouse and the Current Directors.

4. *The two relevant motions for attorney fees*.

On September 14, 2017, Brockhouse and the Current Directors each filed a motion for attorney fees, seeking to recover attorney fees from Plaintiffs *and* Plaintiffs' counsel, jointly and severally.[4] Both motions sought $361,486 in fees without apportionment, consisting of all of the attorney fees that had been incurred by all the HOA Defendants. The motions also requested $27,290 in costs.

The movants contended that attorney fees were proper pursuant to Civil Code section 5975(c) because the causes of action were grounded in enforcement of the CC&Rs. The movants further argued they were entitled to fees pursuant to the attorney fee provision in section 16.3 of the CC&Rs, and that Civil Code section 1717 made section 16.3 of the CC&Rs applicable to all the parties.

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[4] The HOA and the Former Directors also filed a motion seeking attorney fees in the sum of $361,486, and their motion also was denied, but that ruling is outside the scope of this appeal.

5. *Plaintiffs' opposition papers*.

In opposition, Plaintiffs argued that statutory attorney fees under Civil Code section 5975(c) are limited to actions between homeowners associations and their members, and further, the second and third causes of action did not seek to enforce governing documents, as is required by the statute.

Plaintiffs also asserted the movants had no right to recover attorney fees pursuant to section 16.3 of the CC&Rs or under Civil Code section 1717 because the attorney fee clause in the CC&Rs was limited to proceedings *against owners* for breach or default, and thus it did not apply to proceedings *against the HOA*. Further, the attorney fee clause did not apply to the tort claims that were pled here against the former manager and the Current Directors.

Additionally, Plaintiffs contended that the issue of prevailing party status remained to be determined, as the first cause of action for breach of the governing documents had yet to be tried.

6. *Trial court's ruling denying the motions for attorney fees.*

On December 6, 2017, the trial court denied the attorney fees motions brought by Brockhouse and the Current Directors.[5] The trial court ruled the motions were filed prematurely, before judgment had been entered. However, "even if the motion[s] [were] properly filed, [they] would be denied," because the movants were not entitled to recover attorney fees either under Civil Code section 5975(c) or under section 16.3 of the CC&Rs.

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[5] At that time, the trial court also denied the motion for attorney fees filed by the HOA and the Former Directors.

The trial court determined that Civil Code section 5975(c) was inapplicable because it only authorized fees in an action to enforce the governing documents, and the tort claims against Brockhouse and the Current Directors were not an effort to enforce the CC&Rs. Additionally, a claim for attorney fees against Latham and Ruffino could not be made under the statute because they were not unit owners or former unit owners.

As for section 16.3 of the CC&Rs, the trial court found movants' reliance thereon was misplaced because that attorney fee provision, by its terms, applies only to actions "brought because of any alleged breach or default of any Owner, Tenant, their family members, guests, invitees, or other user of any Unit or the Common Area." This lawsuit by Schuchmacher, Latham, and Ruffino was *not* brought because of any alleged default of an owner, tenant, or other user of a unit or the common area.

The trial court further ruled that even if movants were entitled to recover attorney fees, they failed to establish why they should recover the entire $361,486 that had been jointly incurred with the other defendants, namely, the Former Directors and the HOA, as the claims against those defendants were still pending.

7. *Trial court's order granting Plaintiffs' motion to strike three memoranda of costs*.

On December 6, 2017, the trial court also entered an order granting a motion by Plaintiffs to strike three separate memoranda of costs, filed by (1) Brockhouse, (2) the Current Directors, and (3) the Former Directors and the HOA.

The trial court ruled the memoranda of costs were filed prematurely, before entry of judgment, but "[e]ven if the cost memos were properly filed and served, the motion [to strike] would be granted." The trial court stated that on September 27,

2017, the parties seeking costs "filed 3 separate cost memos. The 2 costs memos filed by the Current Directors and Carol Brockhouse, respectively, each seek $27,290.69 in costs and the cost memo filed by the HOA and Former Directors seeks $24,605.19, seemingly because of a math error as the same cost items and amounts are sought in each memo."

The trial court found, inter alia, that the "cost memos alone fail to indicate against which plaintiffs the costs are being sought." Additionally, "claims against the HOA and the Former Directors remain to be decided. [The parties seeking costs] have failed to adequately explain how/why the costs would not have been incurred in relation to the outstanding claims, regardless of any rulings on motions for summary adjudication or summary judgment in their favor."

On February 7, 2018, Brockhouse and the Current Directors filed timely notices of appeal from the December 6, 2017 postjudgment orders denying their motions for attorney fees and striking their memoranda of costs.[6] [7]

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[6] Respondents filed a motion to dismiss the appeals, contending the notices of appeal filed by Brockhouse and the Current Directors are untimely because the clerk's certificates of mailing, served on December 6, 2017, commenced the 60-day period to appeal from the December 6, 2017 orders, making the February 7, 2018 notices of appeal untimely. Not so. The clerk's certificate of mailing does not constitute a "Notice of Entry" of judgment or appealable order, and therefore does not trigger the time for filing notice of appeal. (Cal. Rules of Court, rule 8.104(a)(1)(A); *American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 905.) Because there was no "Notice of Entry" of the orders, the 180-day rule applies. (Cal. Rules of Court, rule 8.104(a)(1)(C).) Therefore, Brockhouse's and the Current

CONTENTIONS

Appellants contend: the trial court erred in determining that the attorney fee motions were not filed timely;[8] they are entitled to attorney fees pursuant to Civil Code section 5975(c); they also are entitled to attorney fees pursuant to Civil Code section 1717 and the applicable attorney fee provisions in the CC&Rs; their attorney fees were appropriately supported and it was the role of the trial court, not the appellants, to apportion attorney fees; and the trial court abused its discretion in granting the motion to strike their memoranda of costs.

DISCUSSION

1. *General principles*.

A prevailing party may recover attorney fees incurred in prosecuting or defending an action as costs only when recovery of attorney fees is authorized by the parties' agreement or by statute. (§§ 1021, 1033.5, subd. (a)(10); *Santisas v. Goodin* (1998) 17 Cal.4th 599, 607, fn. 4.)

Directors' notices of appeal from the December 6, 2017 orders were filed timely.

[7] On February 7, 2018, the HOA and the Former Directors also filed notices of appeal from the orders denying their motion for attorney fees and costs, and granting Plaintiffs' motion to strike their memoranda of costs. They subsequently abandoned their appeals.

[8] It is unnecessary to address the trial court's rulings that the attorney fee motions and the memoranda of costs were filed prematurely because the trial court also ruled on the merits of the attorney fee motions and the motion to strike, and those rulings were proper, as discussed herein.

Ordinarily, a ruling on a motion for attorney fees is reviewed under the abuse of discretion standard. (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.) However, "[w]hether a legal basis exists for an award of attorney fees is a question of law, which the reviewing court examines de novo. [Citation.]" (*Linear Technology Corporation v. Tokyo Electron Ltd.* (2011) 200 Cal.App.4th 1527, 1535, citing *Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677; accord, *Soni v. Wellmike Enterprise Co. Ltd.* (2014) 224 Cal.App.4th 1477, 1481.)

As discussed below, the trial court properly determined that Brockhouse and the Current Directors were not entitled to recover attorney fees, notwithstanding the fact that summary judgments had been entered in their favor.

2. *Brockhouse and the Current Directors are not entitled to recover attorney fees pursuant to Civil Code section 5975(c); the statute authorizes attorney fees to the prevailing party in an action to enforce governing documents, and the tort claims against Brockhouse and the Current Directors were not such an action.*

The discrete issue presented here is whether the causes of action that Plaintiffs asserted against Brockhouse and the Current Directors constituted an action to enforce the HOA's governing documents, so as to implicate the attorney fee provision of Civil Code section 5975(c).

Civil Code section 5975, which is part of the Davis-Stirling Common Interest Development Act (Civ. Code, § 4000 et seq.), states in full: "(a) The covenants and restrictions in the declaration[9] shall be enforceable equitable servitudes, unless

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9 Civil Code section 4135 states: " 'Declaration' means the document, however denominated, that contains the information

unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both. [¶] (b) A governing document other than the declaration may be enforced by the association against an owner of a separate interest or by an owner of a separate interest against the association. [¶] (c) *In an action to enforce the governing documents,*[10] *the prevailing party shall be awarded reasonable attorney's fees and costs*." (Italics added.)[11]

Thus, unless "the Declaration provides otherwise, each owner of a lot or unit in a tract subject to restrictions has the right as an individual to enforce the restrictions against any and all of the other owners' separate interests in the development, or against the association to compel the association to take appropriate enforcement action." (Miller & Starr, Cal. Real

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required by Sections 4250 and 4255." The contents of the declaration shall include, inter alia, "the restrictions on the use or enjoyment of any portion of the common interest development that are intended to be enforceable equitable servitudes." (Civ. Code, § 4250, subd. (a).)

[10] "Governing documents" means the "declaration and any other documents, such as bylaws, operating rules, articles of incorporation, or articles of association, which govern the operation of the common interest development or association." (Civ. Code, § 4150.)

[11] Civil Code section 5975, which was added in 2012 (Stats. 2012, ch. 180, § 2, operative Jan. 1, 2014), continues Civil Code former section 1354 without change. (See Cal. Law Revision Com. com., West's Ann. Civ. Code, foll. § 5975.)

Estate (4th ed.) § 28109, fn. omitted, italics omitted.) Under " 'well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel the association to enforce the provisions of the declaration.' " (*Lambden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 268.)

In the second cause of action, Schuchmacher sued Brockhouse, the former general manager of the HOA, alleging breach of fiduciary duty and seeking tort damages. In the third cause of action, Schuchmacher, together with Latham, his tenant, and Ruffino, a contractor, sued the Current Directors and others for civil conspiracy, and likewise sought tort damages. Neither of these causes of action was an action by an owner against other owners, or against the HOA, *to enforce the governing documents*, making Civil Code section 5975(c) inapplicable.

The cases cited by appellants for the proposition that Civil Code section 5975(c) was implicated are inapposite. Each of those decisions involves litigation between an owner, former owner, or alleged assignee of an owner, on the one hand, and a homeowners association on the other, to enforce the relevant governing documents. (See, e.g. *Tract 19051 Homeowners Assn. v. Kemp* (2015) 60 Cal.4th 1135, 1138 [homeowners association and individual owners sued defendant homeowner]; *Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 Cal.App.4th 1007, 1014 [former owner sued homeowners association in an attempt to enforce CC&Rs]; *Kaplan v. Fairway Oaks Homeowners Assn.* (2002) 98 Cal.App.4th 715, 717 [action by homeowners against association]; *Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379, 1381 [homeowner sued association]; *Harbor View Hills Community Assn. v. Torle*y (1992) 5 Cal.App.4th 343,

345 [association sued homeowners, who cross-complained against association]; *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 367 [homeowner sued to prevent association from enforcing a pet restriction; no issue as to attorney fees]; *Mount Olympus Property Owners Assn. v. Shpirt* (1997) 59 Cal.App.4th 885, 887–890 [owner and association jointly sued other owners, who cross-complained against association and owner]; *Parrott v. Mooring Townhomes Assn., Inc.* (2003) 112 Cal.App.4th 873, 875 [homeowners sued association]; *Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 667 [action by shareholders in apartment cooperative against the cooperative]; *Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 255 [action by association against homeowners]; *Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1028–1029 [action by owners' purported assignees against association].)

In the instant case, the relevant causes of action are tort claims by an owner and two non-owners, who sued a former manager of the HOA and its Current Directors for damages. As the trial court found, this was not an action to enforce the governing documents. Therefore, Brockhouse and the Current Directors are not entitled to attorney fees pursuant to Civil Code section 5975(c).

3. *Brockhouse and the Current Directors are not entitled to recover attorney fees pursuant to the CC&Rs; section 16.3 and section 6.5 thereof are inapplicable.*

a. *Section 16.3 of the CC&Rs.*

Brockhouse and the Current Directors also contend they are entitled to attorney fees pursuant to section 16.3 of the CC&Rs. That section states: "Costs and Attorneys' Fees. *In any*

action brought because of any alleged breach or default of any Owner, Tenant, their family members, guests, invitees, or other user of any Unit or the Common Area, the court may award *to the prevailing party* in any such action such attorneys' fees and other costs as the court deems just and reasonable. In addition, an Owner and/or Tenant shall be responsible for attorneys' fees and costs incurred by the Association prior to litigation to bring the Owner, Tenant, or their family members, guests or invitees into compliance with the Governing Documents." (Italics added.)

This provision, by its terms, is not a general attorney fee provision applicable to any litigation having some connection to the Rockpointe community. It specifically applies to an action "brought because of any alleged breach or default of any Owner, Tenant, their family members, guests, invitees, or other user of any Unit or the Common Area." The tort claims asserted by Schuchmacher, an owner, and Latham and Ruffino, non-owners, against a former manager of the HOA and its Current Directors were *not* an action brought because of an "alleged breach or default of any Owner, Tenant, . . . or other user of any Unit or the Common Area." Therefore, section 16.3 of the CC&Rs does not apply.

b. *Section 6.5 of the CC&Rs.*

Alternatively, appellants contend they are entitled to attorney fees as the prevailing parties pursuant to section 6.5 of the CC&Rs. Leaving aside that movants admittedly did not seek attorney fees pursuant to this provision in the court below, it too is inapplicable.

Section 6.5 is part of article VI of the CC&Rs, pertaining to architectural control by the HOA, and states in relevant part: "(a) In addition to other enforcement remedies set forth in this

Declaration, the Board of Directors shall have enforcement rights with respect to any matters required to be submitted to and approved by it, and may enforce such architectural control by any proceeding at law or in equity. . . . *If any legal proceeding is initiated to enforce any of the provisions hereof, the prevailing party* shall be entitled to recover reasonable attorneys' fees in addition to the costs of such proceeding." (Italics added.)

This provision likewise is not an all-purpose attorney fee provision applicable to any litigation involving the Rockpointe development. It authorizes attorney fees to the prevailing party only in an action by the HOA's board to enforce the HOA's architectural rules. The tort claims that Schuchmacher, Latham and Ruffino brought against a former manager of the HOA and its Current Directors are outside the ambit of section 6.5 of the CC&Rs.

In sum, the trial court properly determined that movants were not entitled to recover attorney fees pursuant to the CC&Rs.

4. *The trial court acted within its discretion in striking the memoranda of costs filed by Brockhouse and the Current Directors.*

We review the trial court's order granting the motion to strike costs under the deferential abuse of discretion standard. (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 52.)

Brockhouse and the Current Directors each filed a memorandum of costs, seeking the identical amount of $27,290.69. (There was also a third memorandum of costs, filed by the HOA and the Former Directors, seeking the same items of costs in the same amounts.) In the memoranda of costs, there was no apportionment of costs between the prevailing defendants, i.e., Brockhouse and the Current Directors, and their

codefendants, namely, the HOA and the Former Directors, as to whom the litigation was still pending.

Where, as here, "a prevailing party incurs costs jointly with one or more parties who remain in the litigation, *during the pendency of the litigation* that party may recover only costs actually incurred by a party or in its behalf in prosecuting or defending the case." (*Fennessy v. Deleuw-Cather Corp*. (1990) 218 Cal.App.3d 1192, 1196, italics in original; see generally, Wegner, Fairbank, Epstein & Chernow, Cal. Prac. Guide: Civil Trials & Evidence (The Rutter Group 2018) § 17:277.) Here, because the claims against the HOA and the Former Directors remained unresolved *and they may ultimately not be the prevailing parties*, it was improper for Brockhouse and the Current Directors to seek all costs that had been incurred to date in the action.[12]

Accordingly, we perceive no abuse of discretion in the trial court's order striking the memoranda of costs filed by Brockhouse and the Current Directors.

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[12] At oral argument, appellants' counsel cited declarations filed in the court below by Attorney Jason Suh, in which Suh stated that Brockhouse and the Current Directors had incurred pro rata costs in the amount of $682.27 and $8,187.21, respectively. However, those declarations were filed in support of the motions by Brockhouse and the Current Directors for attorney fees—the declarations were *not* filed in opposition to the motion to strike the memoranda of costs. Moreover, the memoranda of costs filed by Brockhouse and the Current Directors speak for themselves, and each requested unapportioned costs of $27,290.69.

DISPOSITION

The orders denying the attorney fee motions brought by Brockhouse and the Current Directors, and striking their memoranda of costs, are affirmed. The appeals filed by the HOA and the Former Directors (notices of appeal filed Feb. 7, 2018) are dismissed as abandoned. Respondents' motion for appellate sanctions and motion to dismiss (motions filed May 30, 2018) are denied. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.